No. 207.

Brf. of Dillon, Pierce & Duncan for T. & P. Co.

Supreme Court of the United States.

OCTOBER TERM, 1897.

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THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

ANDY ARCHIBALD.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

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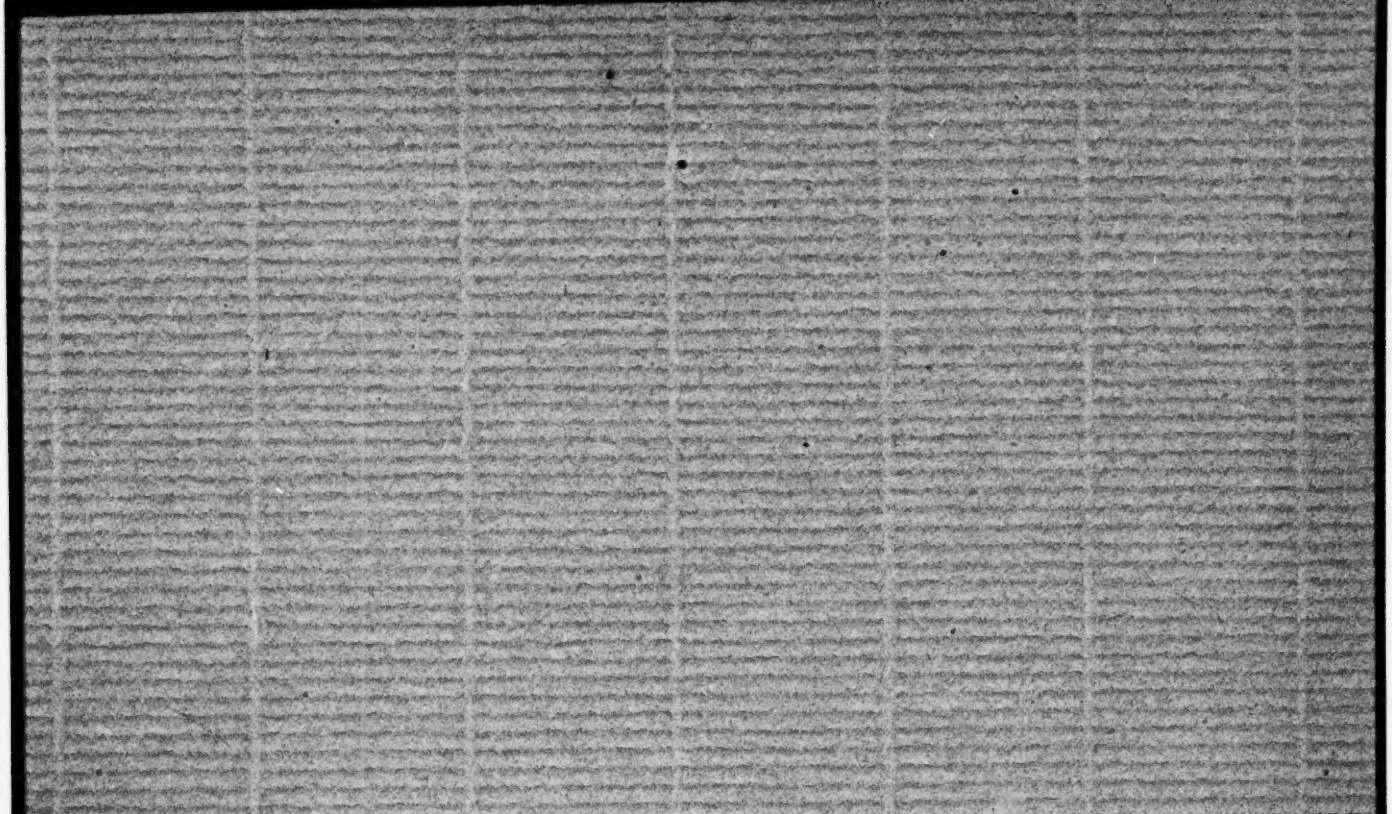

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Statement.

This suit was originally brought by Andy Archibald, a citizen of Shelby County, in the State of Texas, against The Texas and Pacific Railway Company, a corporation created by An Act of Congress, in the District Court of Harrison County, Texas, and was removed to the Circuit Court of the United States for the Eastern District of Texas, on the ground that a federal question was involved, the defendant being a federal corporation.

Plaintiff alleged that on January 20th, 1894, he was a switchman in the employ of the Railway Company in its yards at Shreveport, Louisiana, working under the orders of one Howell, the yardmaster; that the company employed a car inspector whose duty it was to

inspect all cars coming into the yard, "whether they came in over the defendant's railway or some connecting road," and to mark such as he had found to be "out of fix in any of their appliances" for the purpose of advising switchmen of their condition; that on January 20th, 1894, three oil-tank cars belonging to the American Cotton Seed Oil Company were pulled from a side track or branch leading to and for the accommodation of that company's oil mill, and that plaintiff was ordered by the yardmaster to uncouple two of them; that the cars were provided with patent pin-pullers, which would not work, and he was compelled to uncouple them in the ordinary way, and that in attempting to do so a loose rod hanging from one of the cars and projecting into the space between the cars struck him on the leg diverting his attention so that his arm was caught between the draw-head castings, occasioning the injury complained of. Plaintiff expressly says "that his injury was not caused by the pin-pullers being out of fix, but was caused by the loose rod striking his feet" (Tr., p. 3). He alleged negligence on the part of defendant "in failing to inspect and repair said cars and in failing to fasten the rod to the brake and in failing to notify the plaintiff that said rod was loose from its fastenings and liable to trip and throw him down while he was uncoupling said cars" (Tr., p. 3). He also alleged that "his injury was the result of the negligence of said company in its failure to have said cars inspected and in failing to have same repaired, or at least in failing to mark them as out of condition, so that persons working with them would know their condition."

Defendant demurred generally, pleaded the general issue and by way of special plea alleged that "defend-

ant [plaintiff] knew the condition of the cars and track where and when he was hurt and assumed the risk of being thereby injured" (Tr., p. 5).

It appeared on the trial that the yards of the "Cotton Belt" road and those of the Texas and Pacific Railway lie side by side, and that on the side of the Texas and Pacific yards, opposite those of the Cotton Belt there was a short spur track to an oil mill—the distance from the Cotton Belt yards across the Texas and Pacific yards to the oil mill, being variously stated as being 200 or 250 yards; and also that the Texas and Pacific Company's car inspector was stationed at the Junction, about two miles from the yards, where cars received from or to be delivered to other roads were inspected; that there was no inspector at the yards, and that cars merely switched across the yards to be loaded and returned were never inspected (Tr., p. 12).

On the trial plaintiff testified (Tr. pp. 9 and 10) to the details of the accident substantially as he had alleged in his petition. He also said (Tr., p. 10):

"I was hurt on the main track. The cars had been taken out of the oil-mill track a few moments before. They had been placed on the oil-mill track two or three days before that to be filled with oil."

Mr. Vance, for plaintiff, testified (Tr., p. 11):

"The cars had been on the oil-mill switch two or three days. * * * I did see before Archibald was hurt a rod sticking out from under one end of the cars; it was while weighing these cars and adjusting the scales that I had to step over this rod in order to get in and out from between the cars on the oil-mill switch. On the day Archibald was hurt this rod stuck out about two or three feet between the cars. I had to step over it to get to the couplings."

Defendant's witness Howell, the yardmaster, tes-

tified (Tr., p. 11) that the cars were American Oil Co. cars; that they

"came from the Cotton Belt to the yard at Shreveport; they were brought over there for the purpose of loading cotton seed oil into them from the Union Oil mill." * * * "After the oil was loaded into them they were delivered to the Cotton Belt; from the place where these cars were delivered to the Cotton Belt road to the place where Archibald was hurt it was about 200 yards, I guess, and the cars were received from the Cotton Belt at the same place where they were delivered to it;" and that "the purpose for which the cars were being moved was that the oil mill had one of the cars loaded and wanted us to take that out and put the empty one at the oil mill." He also said "the distance from the place where the oil was loaded on the car to where Archibald got hurt is about forty or fifty yards, I guess. It is just a side track that runs out to the oil mill there from the main line."

On Cross-examination (Tr., p. 11) Mr. Howell said:

"that car came into my yard. We had no car inspector there; there was no car inspector in the Shreveport yards. We had one at Shreveport Junction, but none down in the yards."

Mr. Jones, for defendant, testified (Tr., p. 12):

"my occupation at that time was car inspector at Shreveport Junction. My duty was to inspect all cars coming in over our lines into Shreveport Junction and to inspect all cars coming from connecting lines going out over our lines, but switch cars I never inspect, that is, cars from the Cotton Belt transferred to some point in our yard to be delivered back to the Cotton Belt either loaded or empty; it is the duty of the Cotton Belt inspector to inspect those cars and mark them."

Mr. Harris, for defendant, testified (Tr., p. 13):

"Those cars were put in the yard that morning from the Cotton Belt connecting track. They were put there to be loaded with oil by the Union Oil Company, and were to be delivered back to the Cotton Belt Railroad; that was done."

There was a verdict and judgment in favor of plaintiff for $5,000 (Tr., p. 18).

On writ of error to the United States Court of Appeals for the Fifth Circuit, the judgment below was affirmed at the costs of the plaintiff in error (Tr., p. 24).

From this judgment of affirmance The Texas and Pacific Railway Company has sued out a writ of error to this court.

Assignments of Error.

Now comes The Texas and Pacific Railway Company, plaintiff in error, by its attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas.

II.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, which is as follows:

"If you believe that the defendant company had car inspectors at Shreveport, but that it was not their duty under their employment to inspect cars that came from other roads on to defendant's tracks merely for the purpose of being loaded and returned, and if the cars that plaintiff was uncoupling when he was injured had been brought from the Cotton Belt road to be

loaded with oil and returned to said road, and if the plaintiff knew [*or by the exercise of ordinary care could have known*] that it was the custom of the defendant company not to inspect cars that were brought in, as they were, to be returned, then the plaintiff would be held to assume the risk of being injured by reason of defects in said cars, and in such case he cannot recover."

The court gave said charge after erasing the words between brackets as shown above. The court erred in making said erasure and not giving said charge as requested without any erasure.

III.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to give special charge asked for by plaintiff in error, which is as follows:

"It appears in this case that plaintiff was injured while coupling two cars that did not belong to defendant company, but had been brought from the Cotton Belt road to be loaded and returned to that road. Now, if you believe it was the custom of defendant company not to inspect or repair cars when thus brought over to be loaded and returned, and the plaintiff knew this custom [*or could have known it by the exercise of ordinary care*], then he assumed the risk of being injured by any defect in said car and cannot recover."

The court gave this charge after erasing the words between brackets, as shown above. The court erred in making this erasure and in not giving said charge as requested without any erasure.

IV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, which is as follows :

" The duty to inspect cars coming from other roads applies only when the car is to be sent out on the receiving road, and does not apply when cars are switched from one road to be loaded and returned to the road from which they were received."

V.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, which is as follows :

" It is the duty of a railroad company to use ordinary care in keeping the cars which their employees are called on to handle in repair, so as not to expose their employees to unnecessary danger, and this duty exists to use ordinary care to inspect cars that come from other roads to be hauled over their own roads. What is ordinary care is always measured by the facts and circumstances of the particular case, and ordinary care means more care in one case than in another. The amount of care and caution to inspect cars coming from other roads to be merely loaded and returned to the other road is not so great as when the car is to be sent out of the road of defendant, because, in the first place, the car is to be handled only by switchmen who have a much better opportunity to observe any defect and protect themselves than the train men do when a car is placed in a train and sent out on the road. Now, if the defendant used ordinary care to discover and repair defects in the car in question under the circumstances in this case, then defendant is not liable."

VI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, which is as follows :

" That in the absence of any evidence on the point it would be presumed, from the circumstances of this case, that the plaintiff knew the custom of the defendant—not to inspect cars in the Shreveport yard that were switched from other roads to be loaded and returned to the road from which they came."

ARGUMENT.

I.

When a servant enters into an employment he assumes all the risks ordinarily incident to the business, and is presumed to have contracted with reference to all the hazards and risks attending his employment. He cannot recover for injuries resulting to him therefrom.

This general principle is well settled and has been recognized by this Court.

Tuttle vs. Milwaukee Ry., 122 U. S., 189.
Randall vs. Baltimore & Ohio Rd., 109 U. S., 478, and cases cited.

Included among such risks are those arising out of the master's mode of conducting his business, though a safer one might

have been adopted, if the servant knows the custom of doing business and the risk occasioned thereby, or could know it by exercising ordinary care, and continues in his employment.

This proposition we regard as self-evident—a necessary corollary to the general rule above stated. The methods of doing business must necessarily be taken into account when the contract of employment is made in the same way that the character of the machinery in use is considered, which, as is well settled, need not be of the latest or even of the safest pattern.

The authorities recognizing this proposition are referred to below.

Applying these principles to the facts of this case we claim and insist that :

The question whether plaintiff, by exercising ordinary care, could have known that cars which were merely switched across the Texas and Pacific Railway Company's yard to be loaded and returned, and not bound out on its line, were never inspected by the company's car-inspector should have been submitted to the jury.

The second and third assignments of error may, for the purposes of this argument, be considered as the same. They complain of the action of the trial court in refusing to give instructions as requested by the defendant, and in giving them after striking out what we regard as the most important part of them.

The instructions, as requested by the Railway Company, were to the effect that, if plaintiff knew, *or, by*

the exercise of ordinary care, could have known, that it was not the custom of the company to inspect cars which were in its possession merely to be transported across its yards to be loaded and returned, then plaintiff could not recover.

The trial court gave both instructions after striking out of the second the phrase, "*or by the exercise of ordinary care could have known*" (Tr., p. 16), and out of the third the words, "*or could have known of it by the exercise of ordinary care*" (Tr., p. 17), thus confining the jury to proof of the actual knowledge of plaintiff concerning the custom of not inspecting cars which were in its custody merely for the purpose of being loaded and returned.

The Judge presiding at the trial recognized the principle we contend for in his charge respecting the broken rod. He said (Tr., 16):

> "If you believe that the accident was caused by a broken rod, and that that was open and patent to him, or that he saw it, or that, by the exercise of ordinary care, he might have seen it; in that event he cannot recover."

In the next sentence the learned Judge, charging as to the custom of not inspecting this particular class of cars, required defendant to prove *actual knowledge* of such custom by the plaintiff, and later, as we have seen, declined to charge that plaintiff could not recover if, by the exercise of ordinary care, he could have known of the custom of not inspecting such cars. The action of the Court is the more difficult to understand in view of the fact that plaintiff, in his complaint (Tr., p. 4, fol. 8), alleged that "his injury was the result of the negligence of said company in its failure to have same *inspected*, and in failing to have same repaired,

or at least, *in failing to mark them as out of condition*, so that persons working with them would know their condition." He based his action on the alleged negligence of the company in failing to *inspect* the cars and in not marking them as out of condition.

Archibald had ample time and opportunity to know the rules and customs of the company relating to cars and their condition. He admits (Tr., p. 9) that he had been in the Company's employment as switchman about three months. By the Station Agent (Tr., p. 14) it was shown that, on the average, two or three cars a day were shipped from the oil-mill track, and that of these between twenty and twenty-three were so shipped for the Cotton Belt road in January, 1894, the month in which plaintiff was injured.

It is also shown by the yard master (Tr., p. 11) and the car inspector (p. 12) that there was not, and had not been, any inspector at the yards, and that cars switched from the Cotton Belt across the yard of the Texas and Pacific Railway Company to the oil-mill track and back again, a distance of only 200 or 250 yards, were not inspected by any officer or employee of the Texas and Pacific Company.

It is unreasonable to assume that, under these circumstances, plaintiff did not know of these facts. He certainly could have known them by exercising ordinary care.

It is apparent that it was impracticable to inspect the cars received from the Cotton Belt road to be drawn across the Texas and Pacific yards to the oil mill, a distance of, at most, only 250 yards, and to inspect them again after being loaded and before being returned, and also that an inspection of the car in ques-

tion by a regular car inspector was not necessary to discover the defect complained of.

The object of inspecting cars, so far as it relates to liability for injuries, is not to apprise employees or others of patent defects in machinery or appliances. It is to detect latent defects—those not ordinarily discoverable by careful and prudent men, such as cracks in wheels, loose bolts, &c.

Even if it had been the custom of the company to inspect cars of this description, plaintiff would not have been thereby absolved from the duty of exercising ordinary care to discover the defect complained of. This is conceded in the charge of the Court.

The testimony shows conclusively that cars received from the Cotton Belt Road to be transported across the yards of defendant to the oil-mill sidetrack were never inspected, and that there was no inspector at the yards at any time, all inspections being made at the Junction a mile or more away.

We confidently claim that plaintiff had every opportunity of knowing this rule and custom, and by exercising ordinary care would have known it if he did not actually know it. We also claim, with equal confidence, that the question whether by exercising ordinary care he could have known it should have been submitted to the jury; that in a case, as here, where plaintiff seeks redress on the ground that defendant was negligent "in failing to mark them [the cars] as out of condition, so that persons working with them would know their condition," defendant should not be required to prove *actual knowledge* of these facts by the plaintiff.

The importance of the action of the court in modifying the instructions as they were requested lies in the

fact that its effect was to mislead the jury as to the assumption by the plaintiff of the risks of his employment—defendant's principal defense. In effect the court told the jury that if the plaintiff *knew* it was not the custom of defendant to inspect cars merely in its possession for transportation across its yards to be loaded and returned, then and in such case he would have assumed the risks of his employment and could not recover; but, on the other hand, if *actual knowledge* was not shown, that, although by exercising ordinary care he could have known the same fact of non-inspection, he did not assume such risks and could recover.

Defendant's defense of plaintiff's assumption of the risks incident to his employment was thus taken away from the jury unless they could find from the evidence that plaintiff did *in very fact* know of the custom of not inspecting cars of the same description as the one by which he was injured.

In the case of *Texas & Pacific Ry. Co. vs. Minnick*, 13 U. S. App., 520 (s. c., 57 Fed. Rep., 362), one of the questions involved was whether plaintiff's decedent knew or could have known by exercising ordinary care that it was not the rule or custom of the railway company to have a watchman or trackwalker on the bridge where decedent was killed, and the Court said (p. 526):

> "We think it a well established principle of law that an employee assumes the risks ordinarily incidental to the business, and the manner of the employer's performing it, where there is no defect of machinery or unknown hazards."

On the second appeal of that case 23 U. S. App. 310; s. c. 61 Fed. Rep., 632, McCORMICK, C. J., said (p. 317):

"He knew, or with the exercise of ordinary care incumbent on him in his employment would have known, and must therefore be presumed to have known, the customary daily watch that was kept on the track and bridges, and that there was no trackwalker kept on this part of the track, or watchman kept at this bridge. He knew and understood the features and workings of the engines, and the character and extent of the watch that was kept on this bridge. He therefore, according to the settled rule just given, assumed the risk of being injured by the use of such machinery on the track and bridges thus watched. He assumed the risks incidental to the precise state of facts and service out of which the plaintiffs by their pleadings and proof attempt to deduce the liability for the defendant company for his tragic death."

In *Hewitt vs. Flint & Pere Marquette R. R. Co.*, 67 Mich., 61, it was the habit of the railway company to allow cars to run from an elevator on a side track to the main line wholly unattended by a brakeman, and plaintiff was injured by a car so running to the main track. Refering to the method and custom of the railroad company in using its side tracks, the Court said:

"The Court declined to give the defendant's sixteenth request, which is as follows:

"'A railroad company is not bound to change its manner of using its side tracks, nor to adopt the most approved ways or appliances in business. And if one of its servants, knowing, *or having ample means of knowing from long-continued employment*, the way and manner in which the side tracks are used, continues in the employment without complaint, and if from such way and manner is subjected to risks of accident, he is presumed to assume such risks, and, if injured thereby, cannot recover.'

"This request should have been given. It states the rule correctly."

The legal presumption is that one knows that which he has the opportunity of knowing. The jury should

have been allowed to pass upon the evidence as to plaintiff's opportunity of knowing the custom of not inspecting these cars.

The trial Court erred in refusing to give the instruction as it appears in the sixth assignment of error.

In *Chicago R. T. & P. Ry. vs. Linney*, 4 U. S. App., 315, 318; s. c., 59 Fed. Rep., 45, 47—a case in many respects similar to the one at bar—the Court struck out of an instruction, as requested by the defendant, words conveying the same meaning as those stricken out by the trial Judge in this case. Circuit Judge SANBORN said:

"It goes without saying that it is the general rule that the servant assumes the ordinary risks and dangers of the employment upon which he enters, not only so far as they are known to him, but also so far as they would have been known to one of ordinary prudence and sagacity in his situation by the exercise of ordinary care (*Bohn Manufacturing Company vs. Erickson*, 12 U. S. App., 260; *Northwestern Fuel Company vs. Danielson*, 12 U. S. App., 688.) Moreover, *this rule should be carefully given to the jury in the charge of the Court in every case in which the issues and the evidence make it applicable, and the declaration of it is not rendered futile by more specific instructions that clearly and properly guide the jury* as to their findings upon the issues and evidence presented in the particular case on trial."

In that case it was held that other portions of the charge to the jury "supplemented and qualified the portion of the charge objected to, and left it without just ground for exception." In this case no such reason exists for not applying the rule so announced.

The judge's charge confined the jury to proof of *actual knowledge* by plaintiff of the custom of not inspecting cars to be loaded and returned (Tr., p. 16). Nothing whatever appears in the instructions given to the jury

permitting them to take into consideration plaintiff's opportunity of knowing the custom referred to.

Plaintiff testified (Tr,. p. 9) he had been employed as a switchman in the defendant's yard at Shreveport for three months prior to the day when he was injured. By other witnesses it was proved (Tr,. pp. 13, 14) that, on an average, 35 or 40 cars a day were handled in that yard; that at the season of the year (January, 1894) when the accident occurred about 40 cars a day were handled there, and that of these between 20 and 23 were cars transferred from the Cotton Belt road to the oil mill in the same month of January, 1894.

It is entirely improbable that plaintiff, during all this time and under these circumstances, did not notice that cars going to the oil mill to be loaded and returned were not inspected and were never marked when in bad order, as the others were. In fact, one who considers what his duties were, and his opportunity for knowing what was, to him, a matter of great personal importance, must be convinced that he did know these facts and that he did know of this feature of the company's habit of transacting its business.

But the jury were prevented from considering these facts by the refusal of the court to give the instructions set out in the second and third assignments of error as they were presented, and by striking out of them their most important feature, as well as by its charge to the jury, in effect, that only proof of *actual knowledge* by plaintiff of defendant's method of transacting its business in this respect could be considered by them.

We submit that this was clearly error, for which the judgment should be reversed and the cause remanded.

II.

The duty to inspect cars coming from other roads applies only when the cars are to be sent out on the receiving road and does not apply when cars are switched from one road to be loaded and returned to the road from which they were received.

This question is presented by the fourth assignment of error.

It has been held (*Baltimore & Potomac vs. Mackey*, 157 U. S., 72; *Gottlieb vs. N. Y. & L. E. R. Co.*, 100 N. Y., 462; *Goodrich vs. N. Y. Central, &c., Co.*, 116 N. Y., 116) that a railroad owes to its employees the duty to inspect all cars *before sending them out on its road*, but we can find no case where the Courts have held that a car must be inspected when it is only switched or shifted from one yard to another and back again. In the case at bar it would have been most impracticable to have complied with the requirements of plaintiff's contention. It could hardly be required that the Texas and Pacific road would send a man to the Cotton Belt yard (assuming it had the right to send its employee there) to inspect the car before the switchmen went for it with the engine, and still less, that, after being loaded, the Texas and Pacific Company would have to send a man to inspect or repair it on the oil mill track when it was to be sent only 200 yards back to the Cotton Belt road. Carrying the car to the junction to be inspected would have been attended with more danger than was involved in returning it to the Cotton Belt road. The fact that the

car was permitted to remain at the oil mill several days cannot benefit the plaintiff, for it gave him a better opportunity to learn of the defects, as his witness, Vance, did.

In Flanagan vs. Chicago and N. W. Ry., 45 Wis., 103, a car had been pushed off the end of a spur track and broken; and, while it was being carried to the shops, a switchman or brakeman, not knowing of the break, attempted to get on the car and was injured by reason of the broken part. The court said:

"It is too clear for controversy that it was not negligence on the part of the defendant to suffer the broken car to remain at the end of the spur track where it was broken unrepaired as long as it chose. It is immaterial in this action whether it was suffered to remain there a day or a year. Negligence cannot be predicated of the delay, however protracted, to remove or repair it. It is equally clear that the defendant was not bound to repair the car before removing it from the spur track. It had the undoubted right to remove it to its yard or shop, where such work is usually done, and there repair it. Neither was it necessarily negligence of the defendant to put it in a train with other cars to take it to the repair yards or shops."

The judgment under review should be reversed and the cause remanded for a new trial.

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